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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DIVISION

AMERICAN FREEDOM ALLIANCE, a nonprofit corporation,

Plaintiff,

v.

CALIFORNIA SCIENCE CENTER, a legal entity of the State of California; CALIFORNIA SCIENCE CENTER FOUNDATION, a nonprofit corporation; JEFFREY RUDOLPH, an Individual, and DOES 1 through 50, inclusive,

Case No. BC 423687

CALIFORNIA SCIENCE CENTER'S AND JEFFREY RUDOLPH IN HIS OFFICIAL CAPACITY AS PRESIDENT AND CEO OF THE CALIFORNIA SCIENCE CENTER'S REPLY BRIEF IN SUPPORT OF THEIR DEMURRER TO PORTIONS OF FIRST AMENDED COMPLAINT

Date:	May 12, 2010
Time:	8:45 a.m.
Dept:	14
Judge:	The Honorable Terry A. Green
Trial Date:	February 14, 2011
Action Filed:	October 14, 2009

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INTRODUCTION

Plaintiff American Freedom Alliance's ("Plaintiff") opposition to the California Science Center and Jeffrey Rudolph in his official capacity as President and CEO of the California Science Center's ("Center Defendants") demurrer to portions of the First Amended Complaint ("FAC") fail to address the key issues of law and fact which make the FAC deficient:

- Plaintiff fails to adequately address why its tort claim for breach of the implied covenant of good faith and fair dealing should not be dismissed given the lack of a special relationship between the parties;
- Plaintiff fails to adequately explain why the Center Defendants – a state agency defined by the Legislature as an instrumentality of the state and its President and CEO – are not protected by the State's Eleventh Amendment immunity from lawsuits based on federal law;
- Plaintiff fails to adequately explain its failure to sufficiently plead the necessary element of reliance in its fraud cause of action; and
- Plaintiff fails to justify why the Court should allow it to plead a cause of action for injunction, when Plaintiff itself acknowledges that an injunction is not a cause of action but instead a form of relief.

Because Plaintiff's opposition has failed on all these fronts, the Center Defendants respectfully submit that their demurrer should be sustained without leave to amend.

ARGUMENT

I. THE SECOND CAUSE OF ACTION FAILS BECAUSE PLAINTIFF HAS NOT ADEQUATELY PLED A CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

The Center Defendants demurred to the Second Cause of Action for breach of the implied covenant of good faith and fair dealing on the basis that Plaintiff's failure (and inability) to plead the existence of a special relationship between the parties is fatal to this tort cause of action. (Demurrer, at 8-9.) Plaintiff opposed the demurrer on the basis that a special relationship need not be pled. (Opp., at 2-3). Plaintiff is wrong.

The Center Defendants do not take issue with the assertion that a covenant of good faith and fair dealing is implied in every contract. What is relevant for purposes of this demurrer is whether Plaintiff can pursue tort remedies for an alleged breach of that covenant. The law is well settled that a plaintiff may not pursue tort remedies for the breach of the implied covenant of good faith and fair dealing absent the existence of a special relationship. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683, 690-691; *see also Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 412 ["To establish Premier's tort claim for breach of the covenant of good faith and fair dealing, California law requires, as a threshold showing, proof of a 'special relationship' between the parties characterized by elements of public interest, adhesion and fiduciary responsibility. California courts have not extended the 'special relationship' doctrine to include ordinary commercial contractual relationships . . . ."] [citations omitted].)

A "special relationship" has been found to exist "in the context of insurance contracts where, for a variety of policy reasons, courts have held that breach of the implied covenant will provide the basis for an action in tort." (*Foley,* 47 Cal.3d. at 683.) Beyond that, Courts have been reluctant to expand the tort into other contexts. (*See, e.g., Foley*, 47 Cal.3d at 689 [refusing to expand tort to employment context]; *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 103 [adopting "general rule precluding tort recovery for noninsurance contract breach"].) Courts routinely recognize that no special relationship exists between parties engaged in a purely commercial transaction. (*See, e.g., DuBarry Int., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 575, fn. 27, *Martin v. U-Haul Co. of Fresno*, 204 Cal.App.3d at 412.)

As a "special relationship" akin to an insurance relationship must be pled to maintain a cause of action for breach of the implied covenant of good faith and fair dealing seeking tort remedies – and none was pled or could be pled here – the demurrer should be sustained without leave to amend.

To the extent that Plaintiff may now seek to amend its complaint to couch its implied covenant of good faith and fair dealing cause of action as one sounding in contract, such a request should be denied. A claim for an alleged breach of the implied covenant of good faith dealing

seeking contract remedies is barred when the claim is simply repetitive of a breach of a companion contract cause of action:

> If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. Thus, absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery.

(*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

In this case, Plaintiff has pled a breach of contract cause of action and a breach of the implied covenant of good faith and fair dealing. (*See* FAC, First Cause of Action, ¶¶ 31-39, *and* FAC, Second Cause of Action, ¶¶ 40-44.) The alleged breach of contract and breach of the implied covenant of good faith and fair dealing are premised on the same allegations and seek the same relief. (*Id.*) As such, to the extent Plaintiff would seek contract remedies for the alleged breach of the implied covenant of good faith and fair dealing, the Court should treat that hypothetical cause of action as "superfluous" and refuse to grant leave to amend on that basis. (*Bionghi v. Metropolitan Water Dist. of So. California* (1999) 70 Cal.App.4th 1358, 1370 [cause of action for breach of the implied covenant of good faith and fair dealing may be "disregarded" as it "is duplicative of the cause of action for breach of contract"].)

The lead case relied on by Plaintiff, *Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal.App.4th 1089, is inapposite to this case. First, the plaintiff in *Pasadena Live* was apparently only seeking contract remedies, and thus neither the parties nor the Court of Appeal had cause to discuss the need for a plaintiff to plead a special relationship when seeking tort remedies. (*Id.*, at 1092.) Second, the plaintiff's *only* cause of action was premised on the breach of the implied covenant of good faith and fair dealing, and thus was not duplicative of another cause of action for breach of contract. (*Id.*) As such, the case does not stand for the proposition that a plaintiff can seek tort remedies without pleading a special relationship. Nor does it support an amendment of the cause of action to seek contract remedies as it is simply duplicative of Plaintiff's breach of contract cause of action.

II. THE THIRD CAUSE OF ACTION FOR ALLEGED VIOLATION OF 42 U.S.C. § 1983 FAILS AS THE ELEVENTH AMENDMENT IMMUNIZES THE CENTER DEFENDANTS AS A MATTER OF LAW

The Center Defendants demurred to the Third Cause of Action alleging a breach of 42 U.S.C. § 1983 on the basis that the Eleventh Amendment immunizes them to lawsuits brought pursuant to federal law, absent either the State's explicit waiver of sovereign immunity or a federal statute enacted by Congress pursuant to the Fourteenth Amendment explicitly intending to abrogate the State's Eleventh Amendment sovereign immunity. (Demurrer, at 10-11.)[1] While the State and its departments and agencies and those employees acting in their official capacity are immune from suit under the Eleventh Amendment as instrumentalities of the state, local governmental units (like cities, counties and municipalities) are not similarly immune. (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 70 ["States are protected by the Eleventh Amendment while municipalities are not"]; *Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 ["Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. . . . States and their instrumentalities, on the other hand, are not"] [citations omitted].)[2]

Plaintiff opposed the demurrer on the basis that the Court must assess a number of factors to determine whether the Center Defendants are an arm of the State that is protected by the Eleventh Amendment, or is a local governmental unit that is not protected. (Opp., at 4-10.) The test Plaintiff argues must be applied to the facts of this case is simply inapplicable to the Center Defendants, as it applies only to quasi- or hybrid- governmental entities, like school districts,

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[1] In general terms, the Eleventh Amendment protects States from suit brought in federal court or brought pursuant to federal law. After the Civil War, the Fourteenth Amendment was adopted and authorized Congress to enact statutes to enforce the federal civil rights guaranteed therein and to abrogate the State's Eleventh Amendment immunity. At issue in *Will v. Michigan* was whether Congress intended to abrogate the State's Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983. (*Will*, 491 U.S. at 66.) The Court held that Congress did not abrogate the State's Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983, and therefore States and State employees acting in their official capacity may not be sued pursuant to that statute. (*Id.*, at 67.)

[2] While the United States Supreme Court held that "local governmental units" were not protected by the Eleventh Amendment, it also expressly clarified that its "holding today is, of course, limited to *local* government units which are not considered part of the *State* for Eleventh Amendment purposes." (*Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658, 690, fn. 54 [emphasis added].)

when it is unclear whether they are in fact state agencies. (*See, e.g., Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098 ["The issue in this case is whether the Lake Elsinore Unified School District (the District) is immune from suit under title 42 United States Code section 1983 (hereafter section 1983) as an instrumentality of the State of California"]; *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 280 ["The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend"]; *Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198 [issue was whether community college district was arm of state or local governmental unit].)

Here, the California Science Center is without question a state agency and the Court need not apply the multi-factor test identified by Plaintiff. Plaintiff itself acknowledges that "Defendant, California Science Center . . . is a department of the State of California . . . ." (FAC, ¶ 2.) Plaintiff is indeed correct. In 1967, the California Legislature enacted a statute which states that the California Science Center is found within a department of the state and is an instrumentality of the state:

> The Sixth Agricultural District Association shall be known as the California Science Center. It is in the State of Consumer Services Agency and is deemed to be a tax-exempt organization as an instrumentality of this state in accordance with Section 23706 of the Revenue and Taxation Code.

(Food & Ag. Code, § 4101 [emphasis added].) Furthermore, the directors of the California Science Center (as well as all other Agricultural Districts) are "appointed by the Governor." (Food & Ag. Code, § 3959.)[3] Under no scenario could the Center be classified as anything other than an instrumentality of the State for purposes of the Eleventh Amendment.

As cited in the Center Defendants' demurrer, case law uniformly holds that state departments, commissions and boards like the California Science Center are protected by the Eleventh Amendment. (*See, e.g., Rossco Holdings, Inc. v. State of California* (1989) 212

[3] The Center Defendants ask that the Court take judicial notice of Food and Agriculture Code sections 3959 and 4101 pursuant to Evidence Code section 451, subd. (a) ["Judicial notice shall be taken of the following: (a) . . . public statutory law of this state . . . ."].

Cal.App.3d 642, 661 [demurrer sustained dismissing Section 1983 action against the California Coastal Commission because, as it is "clearly a state agency, it is immune from prosecution under 42 United States Code section 1983"]; *Brunius v. Parrish* (2005) 132 Cal.App.4th 838, 851 [demurrer sustained dismissing Section 1983 action against State Mining and Geology Board].) Courts in these cases did not need to apply the factors suggested by Plaintiff in the school-district line of cases in order to reach this plainly obvious conclusion. Plaintiff does not attempt to distinguish why the California Coastal Commission and the State Mining and Geology Board – entities which similarly were created by the California Legislature and whose members are appointed by the Governor and other state officials[4] – are protected by the Eleventh Amendment, but the California Science Center should not be so protected.

The cases Plaintiff cites in its opposition all deal with whether school districts are and similar entities are arms of the State protected by the Eleventh Amendment or whether they are local governmental entities which are not protected. (Opp., at 6-8.) It is simply unnecessary for the Court to apply the test that Plaintiff argues are present in the school district based *Mitchell-Lynch-Kirchmann* line of cases to determine whether the Center and its employee's acting in their official capacity[5] are arms of the State with Eleventh Amendment immunity.

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[4] (Pub. Res. Code, § 660 ["There is in the department a State Mining and Geology Board consisting of nine members appointed by the Governor, subject to confirmation by the Senate."]; Pub. Res. Code, §§ 30300, 30301 [establishing the Coastal Commission and identifying the manner in which the Commissioners are appointed by the Governor, the California Senate, and California Assembly].)

[5] This brief does not address the contention made in Plaintiff's proposed sham amendment to name the California Science Center's President and CEO Jeffrey Rudolph as a defendant in his individual capacity in order to plead around his Eleventh Amendment immunity. Plaintiff devotes more than one page of its Opposition arguing that Rudolph can be named as a defendant in his individual capacity. (Opp., at 9:15-10:18.) These arguments are not properly before the Court as Plaintiff admits that Rudolph was named in the FAC in his official capacity only, and Plaintiff is seeking leave of Court to name him in his individual capacity. (Opp., at 9, fn. 3.) Therefore, argument about the extent of Rudolph's potential liability were he named as a defendant in his individual capacity are not properly before the Court on this demurrer. Such argument should, at a minimum, be disregarded by the Court, and more appropriately, stricken from the Opposition.

III. THE FOURTH CAUSE OF ACTION FOR FRAUD FAILS AS PLAINTIFF HAS NOT SUFFICIENTLY PLED RELIANCE

The Center Defendants demurred to the Fourth Cause of Action for Fraud on the basis that, even taking Plaintiff's allegations as true, it did not plead reliance as required to maintain such a cause of action. (Demurrer, at 10-12.) Plaintiff opposes the demurrer on two bases. Plaintiff first argues that a plaintiff's reliance is not an element that must be pled to state a cause of action for fraud. (Opp., at 11:10-12.) Plaintiff is simply wrong – a plaintiff's reliance on the allegedly false representation is an essential element to all species of a fraud cause of action, including ones couched as "deceit":

> The tort of deceit is sometimes stated with five, or even four, elements. . . . The elements of fraud that will give rise to a tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage"] . . . .
>
> A complaint for deceit must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages.

(*Manderville v. PCG & S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498, fn. 4 [citations omitted, emphasis added].)

Plaintiff's citations to the statutory definition of "deceit" do not somehow mean that a plaintiff does not need to adequately plead detrimental reliance.

Plaintiff next argues that to the extent pleading reliance is necessary, it has adequately done so. (Opp., at 12:15-13:10.) Plaintiff is again wrong. While Plaintiff disputes the reasons given for the Event's cancelation, Plaintiff does not dispute that the Event was canceled. (Opp., at 12:25-13:1.) This is a significant distinction which precludes Plaintiff from alleging that it relied on an alleged misrepresentation resulting in damages. Assuming *arguendo* that the Center Defendants were both parties to the contract and misrepresented to Plaintiff the reasons for the Event's cancelation, any of Plaintiff's alleged resultant damages would not have been attributable to Plaintiff's action or forbearance upon an alleged misrepresentation, but upon the fact that the Event had been unilaterally canceled (for whatever the reason, true or otherwise.) When Plaintiff was informed that the Event was canceled, Plaintiff was not tricked into doing or not doing

anything. Anything Plaintiff did was in response to the simple fact that the Event was canceled, regardless of whether the reasons given for the cancelation were true or not. At most, Plaintiff has alleged only a breach of contract cause of action.

IV. THE FIFTH CAUSE OF ACTION FAILS AS AN INJUNCTION IS NOT A CAUSE OF ACTION

The Center Defendants demurred to the fifth cause of action for an injunction on the basis that an injunction is not a cause of action but instead a form of relief. (Demurrer, at 13.) Plaintiff opposes the demurrer, but not without first conceding the point that "injunctive relief is, by its very terms, a form of relief sought." (Opp., at 14:11.) Plaintiff's concession is required, as the law is unambiguous that an injunction is not a proper cause of action. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 618 [plaintiff's "cause of action for an injunction was improper as an injunction is a remedy, not a cause of action"].)

Plaintiff argues that it should nonetheless be allowed to plead a cause of action for injunction on the basis that doing otherwise would "elevate form over substance." (Opp., at 14:21-22.) The Center Defendants do not advocate elevating "form over substance" but that is precisely what Plaintiff does by pleading a form of relief as a cause of action. Substantively, injunctive relief is relief. Further complicating the pleadings by disguising a request for injunctive relief as a cause of action is the very definition of elevating form over substance.

Requiring a plaintiff to plead only causes of action which are recognized as such by California courts serves important purposes. First, it serves to set the operative pleadings in a way that appropriately frames the issues for trial. (*Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 971 ["A civil complaint serves to frame and limit the issues and to apprise the defendant of the basis on which the plaintiff seeks recovery. [citation] The complaint also limits the proof that may be submitted, because it advises the court and the adverse party of what plaintiff relies on as a cause of action."].) Second, it will help clarify what causes of action remain to be litigated once the pleadings are settled. A plaintiff may obtain an injunction only if it prevailed on a cause of action that would support its issuance. (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973 ["A permanent injunction is an equitable remedy,

not a cause of action, and thus it is attendant to an underlying cause of action"].) Should no cause of action remain which would support injunctive relief, allowing Plaintiff to continue to assert a "cause of action" for injunction will unnecessarily create confusion where none should exist. Sustaining the demurrer as to the Fifth Cause of Action for injunction will help streamline the pleading and assist the parties and the Court as this matter proceeds towards trial.

CONCLUSION

The Center Defendants respectfully request that the Court sustain their demurrer without leave to amend, as requested in their demurrer.

Dated: May 5, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
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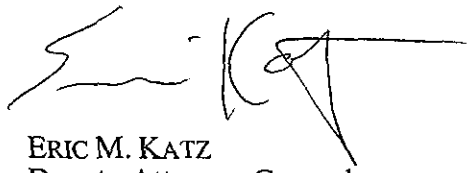

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DECLARATION OF SERVICE BY ELECTRONIC MAIL & U.S. MAIL

Case Name: **American Freedom Alliance v. California Science Center, et al.**

Case No.: **BC 423687**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 5, 2010, I served the attached CALIFORNIA SCIENCE CENTER'S AND JEFFREY RUDOLPH IN HIS OFFICIAL CAPACITY AS PRESIDENT AND CEO OF THE CALIFORNIA SCIENCE CENTER'S REPLY BRIEF IN SUPPORT OF THEIR DEMURRER TO PORTIONS OF FIRST AMENDED COMPLAINT by transmitting a true copy via ELECTRONIC MAIL. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 5, 2010, at Los Angeles, California.

Joanna C. Salansang
Declarant

Signature

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